

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8**

**SPAULDING CONSTRUCTION, INC.**

**Employer**

**and**

**OPERATIVE PLASTERERS' AND CEMENT  
MASONS' INTERNATIONAL ASSOCIATION,  
LOCAL UNION NO. 404**

**Petitioner**

**Case No. 8-RC-16333**

**and**

**BRICKLAYERS AND ALLIED CRAFTWORKERS  
LOCAL UNION NO. 16**

**Intervenor**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.<sup>1</sup>

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

*All full-time and regular part-time employees of the Employer engaged in cement mason work, including journeyworkers and apprentices, but excluding all office clerical employees and professional employees, guards and supervisors as defined in the Act and all other employees.*

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<sup>1</sup> The Petitioner filed a post-hearing brief that has been duly considered. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed, including his ruling to allow Bricklayers and Allied Craftworkers, Local 16 to intervene in this matter. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organizations involved claim to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

I note that this bargaining unit does not have any geographic limitations. There are approximately sixteen employees in the unit found appropriate herein.

I note that this case involves an Employer in the construction industry. The record reflects that the Employer is a party to at least three agreements that apply to the work of it cement masons in various geographical areas of Northeast Ohio. One such identified agreement is with the Petitioner, the second with the Intervenor and the third is with Cement Masons Local 109 which is located in Akron, Ohio. The contracts with the Petitioner and Cement Masons Local 109 appear to be Section 8(f) agreements. The Intervenor's contract appears to be a Section 9(a) agreement.

At the hearing the parties stipulated that there is no contract which would act as a bar to this proceeding. Since there is no record evidence to the contrary, I accept the parties' stipulation.<sup>2</sup>

## **I. The Issues**

There are two primary issues to be determined in this representational proceeding. The first is whether the unit must be limited geographically in order to be deemed appropriate. The Petitioner seeks a unit that includes all cement masons<sup>3</sup> employed by the Employer at any and all job sites without geographic limitation. The Intervenor asserts that the only appropriate unit would be one limited to Cuyahoga County, Ohio. The Employer takes the position that the appropriate unit should be one structured such that the Employer is not required to pay a higher wage rate than the prevailing geographic local pay rate where work is sought.

The second issue is the voting eligibility of three working foremen: Brian Borrell, Sam Thompson and Andrew Wright. The Intervenor asserts that they have duties and authority that would make them supervisors within the meaning of Section 2(11) of the Act. The Petitioner and the Employer dispute that contention and urge that these individuals be found eligible to vote.

## **II. Decision Summary**

I find that the petitioned for unit is appropriate and direct an election in that unit. I further find that Borrell, Thompson and Wright are not statutory supervisors and are eligible to vote in the election directed herein.

## **III. Unit Scope**

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<sup>2</sup> The petition in this case was filed on February 13, 2002. It was administratively blocked by the filing of 8-CA-32936 on February 19, 2002. On May 20, 2004 the processing of the petition resumed after the closure of the unfair labor practice case.

<sup>3</sup> At hearing, the term "cement finishers" and "cement masons" was used interchangeably by the parties.

As noted above, the Petitioner seeks a unit of cement masons employed by the Employer without geographic limitation. The Intervenor contends that an election should be directed only among those individuals employed within Cuyahoga County, Ohio because that is the geographic area encompassed by the Employer's contract with the Petitioner.

The Employer performs concrete work and general contracting from its facility located in Canton, Ohio. It utilizes a core workforce of about 16 full-time cement masons which includes the three working foremen. The number of cement masons employed fluctuates based upon the Employer's workload throughout the year, ranging from about four to five masons in the winter to about twenty-five masons during peak construction. While the majority of the Employer's job sites appear to be within an hour driving radius of Canton, Ohio, it also performs work in several other counties beyond this area throughout Northeastern Ohio.<sup>4</sup> In addition, the Employer, at times, has performed work outside the state of Ohio. It applies a number of different collective bargaining agreements to this work, depending on the county where the work is performed. Specifically, its contract with the Petitioner applies only to work performed within Cuyahoga County. Its contract with the Intervenor applies to work performed in Lake, Geauga and Ashtabula counties. The Employer's contract with Cement Masons Local 109 applies to work performed in Stark and Summit counties.<sup>5</sup> The Employer's President and CEO Lee Spaulding, testified that the only restriction it places on where it seeks work is one based upon travel time.

When the Board has addressed the appropriate geographic scope of construction bargaining units, it has examined: (1) whether there is a core group of employees who travel from place to place, and (2) the history of where the core group has worked or reasonably foresees working in the future. **Alley Drywall, Inc., 333 NLRB No. 132 (2001)**; **Oklahoma Installation Co., 305 NLRB 812 (1991)**. Based upon the record evidence regarding this Employer's work practices, I find that the petitioned for unit without geographic limitation is an appropriate one. The evidence clearly establishes that the Employer utilizes a core group of cement masons at many or all of its jobs and that this work is frequently performed outside Cuyahoga County and throughout much of the state of Ohio. It has also previously performed work outside the state of Ohio. There is no evidence that it will not continue to seek work outside Cuyahoga County in the future. The fact that the Employer's current agreement with the Petitioner is limited to Cuyahoga County is not determinative on this issue. The Board has repeatedly declined to rigidly define a unit in a representation proceeding based upon the scope of Section 8(f) agreements. **Dezcon, Inc., 295 NLRB 109 (1989)**, **Alley Drywall, supra**.

In declining to limit the unit to the confines of the Petitioner's existing geographically defined unit, I also note that the Petitioner need only seek an appropriate unit, not one that might be deemed the most appropriate. **Overnite Transportation, 322 NLRB 723 (1996)**. As noted above, the Employer has performed most of its work

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<sup>4</sup> The majority of this work appears to be located within Stark and Summit counties.

<sup>5</sup> The Employer has complied with contracts with Cement Masons locals in Youngstown and Columbus, Ohio when performing work in those areas.

outside of Cuyahoga County, Ohio. Under these circumstances, there is no compelling reason to find that the petitioned-for unit is not appropriate.

#### **IV. Eligibility of Borrell, Thompson and Wright**

As noted, Brian Borrell, Sam Thompson and Andrew Wright are full-time cement masons that the Employer utilizes as core employees on its jobs. The record indicates that they serve as working foremen, responsible for insuring that jobs are carried out in an efficient manner. However, the record indicates that Spaulding visits the work sites on a regular basis and exercises ultimate control over what happens on the job. The vast majority of Borrell, Thompson and Wrights' work time is spent performing cement masons' work. They do not have any authority as to how jobs are scheduled or which employees are assigned to a particular job. There is no evidence in this record that they have any authority to assign overtime to employees or to grant employees leave from work. They cannot fire employees.

Spaulding testified that he considers input from Borrell, Thompson and Wright regarding personnel matters, specifically as it relates to discipline. While Borrell, Thompson and Wright from time to time have made recommendations regarding discipline, to Spaulding, Spaulding testified he conducts an independent investigation before deciding whether to take action against an employee. Spaulding further noted instances where he has acted contrary to the disciplinary recommendations of his working foremen.

There is no record evidence regarding the involvement of Borrell, Thompson or Wright in any formal evaluation of employees. Further, none of the three working foremen have regular involvement in the hiring of new employees

The three working foremen generally receive higher pay than the other cement masons pursuant to provisions of the applicable collective bargaining agreement(s). They, however, do not receive any fringe benefits that differ from other employees.

Section 2(11) of the Act defines the term "supervisor" as "any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment."

The burden of proving supervisory status is on the party who alleges that it exists. **NLRB v. Kentucky River Community Care, Inc., 121 S.Ct. 1861, 1863 (2001)** The exercise of some supervisory authority in merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status. **Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985), aff'd. in relevant part 794 F.2 527 (9<sup>th</sup> Cir. 1986).**

Based on the above, I have concluded that the Intervenor has not met its burden of showing that the three working foremen are supervisors within the meaning of the Act. It is undisputed that most of their work time is spent performing the duties of any other cement mason. Their involvement in the routine direction of work is not of the type to confer supervisory status. **North Shore Weeklies, Inc., 317 NLRB 1128 (1995).** As the Supreme Court noted in **Kentucky River, supra**, there is a distinction to be drawn between employees who direct the manner of others' performance of discrete tasks and supervisors who direct other employees. The direction engaged in by Borrell, Thompson and Wright clearly involve the former. While they have made some recommendations regarding whether to discipline employees, the evidence shows that Spaulding conducts an independent investigation before deciding whether to discipline an employee. Accordingly, under the circumstances, the input of the working foremen does not constitute the type of effective recommendation that establishes statutory supervisory authority. **Brown & Root, Inc., 314 NLRB 19, 23 (1994).**

In sum, I find that Borrell, Thompson and Wright are not statutory supervisors and are therefore eligible to vote in the election directed herein.

Since the Employer is engaged in the construction industry and the record reflects that the number of unit employees varies from time to time, the eligibility of voters will be determined by the formula in **Daniels Construction Co., 133 NLRB 264 (1961)** and **Steiny & Co., 308 NLRB 1323 (1992).**

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Also eligible to vote are those employees who have been employed for a total of 30 working days or more within the period of 12 months immediately preceding the eligibility date for the election, or who have some employment in that period and have been employed 45 working days or more within the 24 months immediately preceding

the eligibility date for the election, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Those eligible shall vote whether or not they desire to be represented by: (1) Bricklayers and Allied Craftworkers Local Union No. 16; or (2) Operative Plasterers and Cement Masons International Association; or (3) Neither.

### **LIST OF VOTERS**

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior Underwear Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969).** Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994).** The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by August 13, 2004.

Dated at Cleveland, Ohio this 30th day of July 2004.

/s/ "[Frederick J. Calatrello]"

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Frederick J. Calatrello  
Regional Director  
National Labor Relations Board  
Region 8